# IN THE SUPREME COURT OF GUAM

**THE PEOPLE OF GUAM,**
Plaintiff-Appellee,

**v.**

**NRINEXT RIOCNE**
Defendant-Appellant,

and

**JIMMY KIRACHY and JAMES KIROSY,**
Defendants.

Supreme Court Case No. CRA11-003
Superior Court Case No. CM0705-10

## OPINION

**Cite as: 2012 Guam 5**

Appeal from the Superior Court of Guam
Submitted on Appellant's Brief October 31, 2011
Hagåtña, Guam

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice; ROBERT J. TORRES, Associate Justice; and KATHERINE A. MARAMAN, Associate Justice.

**MARAMAN, J.:**

**[1]** Defendant-Appellant Nrinext Riocne appeals from a conviction of one count of disorderly conduct, as a violation. Riocne argues that the trial court erred when it approved an amendment to the complaint charging the defendant under a different subsection of the disorderly conduct statute because it was an additional or different offense. Riocne also argues that his conviction is a nullity because the trial court failed to arraign him on the amended charge. After an independent examination of the law and the record on appeal, we find that Riocne's substantial rights were not prejudiced by either the amendment or the trial court's failure to rearraign him on the amended complaint. We therefore affirm his conviction.

## I. FACTUAL AND PROCEDURAL BACKGROUND

**[2]** Guam Police Department Officer Donny Pangelinan was called regarding a disturbance at Hemlani Apartments in Harmon, Guam and arrived at the scene around midnight. Officer Pangelinan observed the Defendant-Appellant, Nrinext Riocne, shouting from the second floor of the apartment building. Officer Pangelinan advised Riocne to calm down and began to question him. In the middle of questioning, Riocne continued to shout at a group of males. Upon instructing Riocne to calm down once more, he complied. Shortly thereafter, Riocne began shouting in the direction of Officer Pangelinan and told him, "Fuck you." Transcripts ("Tr.") at 12-13 (Bench Trial, May 16, 2011). Riocne was then arrested for disorderly conduct. The People filed a magistrate's complaint charging Riocne with disorderly conduct as a petty misdemeanor under 9 GCA § 61.15(a)(1) and (c) and public drunkenness as a violation. Before trial, the People moved to amend the complaint to charge Riocne with disorderly conduct under 9

GCA § 61.15(a)(2) and (c) and public drunkenness under 9 GCA § 61.25(a) and (b). The People amended the complaint on the grounds that the charge under subsection (a)(2) better fit the facts of the case and "[the] amendment [did] not charge an additional or different offense and [did] not prejudice the substantial rights of the defendant." RA, tab 49 at 2 (Mot. Leave of Ct. to File Am. Compl., May 13, 2011). Over Riocne's objection, the trial court granted the People's motion to amend. After a bench trial, the trial court found Riocne guilty of a lesser included offense, disorderly conduct as a violation. This appeal followed.

## II. JURISDICTION

**[3]** This court has jurisdiction over an appeal from a final judgment of the Superior Court of Guam pursuant to 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 112-104 (2012)); 7 GCA §§ 3107(b) and 3108(a) (2005); and 8 GCA §§ 130.10 and 130.15(a) (2005).

## III. STANDARD OF REVIEW

**[4]** Review of a trial court's decision to permit an amendment to a charging document is one of abuse of discretion. *State v. Seeler*, 316 S.W.3d 920, 925 (Mo. 2010) (citing *State v. Smith*, 242 S.W.3d 735, 742 (Mo. Ct. App. 2007)); *City of Windsor Heights v. Spanos*, 572 N.W.2d 591, 592 (Iowa 1997); *State v. Wilson*, 172 P.3d 1264, 1268 (Mont. 2007).[1]

**[5]** A trial court's failure to arraign a defendant is reviewed for reversible error. *See State v. Bruyette*, 604 A.2d 1270, 1277 (Vt. 1992) (internal citation omitted) ("It may be reversible error if a defendant is not arraigned on any charge, or if an arraignment is not held after a material change is made to the charges."); *Tingle v. State*, 632 N.E.2d 345, 355 (Ind. 1994) ("A showing

[1] In *People v. Salas*, we held that we review the amendment of an indictment *de novo*. 2000 Guam 2 ¶ 10 (citing *United States v. Morlan*, 756 F.2d 1442, 1444 (9th Cir. 1985)). However, review of an indictment is *de novo* only when reviewing the sufficiency of the indictment. *See Morlan*, 756 F.2d at 1444.

of harm prejudicial to the defendant's substantial rights is required to demonstrate reversible error.").

## IV. ANALYSIS

**[6]** Over Riocne's objection, the trial court granted the People's motion to amend the complaint charging Riocne under a different subsection. Tr. at 2-3 (Bench Trial). Riocne maintains in his opening brief on appeal that the trial court's ruling was error because 8 GCA § 55.20 permits the prosecution to amend the complaint at trial, but not to add a new charge. Appellant's Br. at 5-8 (Sept. 12, 2011). The People did not file an opposing brief, but instead submitted a letter pursuant to Rule 13(i) of the Guam Rules of Appellate Procedure.[2] Letter from Attorney General to Clerk of Court, Re: *People v. Riocne* (Oct. 26, 2011). The People argue that Riocne should have been arraigned on the new charge, but maintain that the bench trial was proper and without error. *Id.* Though the People have asserted that this change in its position is dispositive of the issues raised in this appeal, *id.*, this court has clarified that "'the proper administration of the criminal law cannot be left merely to the stipulation of parties.'" *People v. Yingling*, 2009 Guam 11 ¶ 13 (quoting *Young v. United States*, 315 U.S. 257, 259 (1942)). Accordingly, this court has a "responsibility to independently examine the law and the record to determine whether the prosecutor's concession is well-founded." *Id.* (citations omitted).

### A. Amendment of a Complaint Under Guam Law

**[7]** Guam's statute allowing an accusatory pleading to be amended, 8 GCA § 55.20,[3] reads:

[2] Rule 13(i) requires counsel to "timely inform the Clerk and each other party by letter of all developments affecting appeals, certified questions, motions or writ petitions pending in this Court, including contemplated and actual settlements, circumstances or facts that could render the matter moot and pertinent developments in applicable case law, statutes and regulations." Guam R. App. P. 13(i).

[3] This statute is similar to Federal Rule of Criminal Procedure 7(e). Rule 7(e) provides: "Unless an additional or different offense is charged or a substantial right of the defendant is prejudiced, the court may permit an information to be amended at any time before the verdict or finding." Fed. R. Crim. P. 7(e).

> The court may permit an indictment or information to be amended upon the application of the prosecuting attorney at any time before verdict or finding if no additional [or] different offense is charged and if substantial rights of the defendant are not prejudiced.

8 GCA § 55.20 (2005) (alteration in original).[4] Under this two-prong test, an amendment to the complaint charging Riocne with disorderly conduct was allowed if: (1) no additional or different offense was charged, and (2) the substantial rights of Riocne were not prejudiced.

**[8]** The first magistrate's complaint charged Riocne with disorderly conduct as a petty misdemeanor under 9 GCA § 61.15(a)(1) and (c) and public drunkenness as a violation. RA, tab 1 at 2 (Magistrate's Compl., Aug. 23, 2010). The amended magistrate's complaint charged Riocne with disorderly conduct as a petty misdemeanor under 9 GCA § 61.15(a)(2) and (c) and public drunkenness as a violation under 9 GCA § 61.25(a) and (b). RA, tab 49, ex. A at 2 (Am. Magistrate's Compl., May 13, 2011). The People amended the complaint on the grounds that the charge under section 61.25(a)(2) better fit the facts of the case and "[the] amendment [did] not charge an additional or different offense and [did] not prejudice the substantial rights of the defendant." RA, tab 49 at 2 (Mot. Leave of Ct. to File Am. Compl., May 13, 2011). When Riocne objected to the amendment at trial, the People reiterated that there was no additional or different offense, arguing that "[i]t's still disorderly conduct," but conceding that the charge was based on creating noise as opposed to fighting. *See* Tr. at 2-3 (Bench Trial). On appeal, Riocne argues that the People's amendment was improper because it charged a new statutory violation and alleged new facts. *See* Appellant's Br. at 6.

[4] A Complaint may be amended in the same manner as an indictment or information. *See* 8 GCA § 15.10 (2005) ("[T]he Complaint shall be subject to the same rules of pleading as an indictment for [sic] information.").

**1. Different Offense**

**[9]** Guam's disorderly conduct statute, 9 GCA § 61.15(a), provides:

> (a) A person is guilty of disorderly conduct, if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:
>
> (1) engages in fighting or threatening, or in violent or tumultuous behavior;
>
> (2) makes unreasonable noise or offensively coarse utterance, gesture or display, or addresses abusive language to any person present; or
>
> (3) creates a hazardous or physically offensive condition by any act which serves no legitimate purpose of the defendant.

9 GCA § 61.15(a) (2005). The original complaint stated that Riocne "recklessly created a risk of public inconvenience, annoyance and alarm by violent and tumultuous behavior, after a reasonable warning and request to desist," in violation of 9 GCA § 61.15(a)(1). RA, tab 1 at 2 (Magistrate's Compl.). The People's declaration in support of the original complaint stated that Riocne "continued to behave aggressively trying to fight with the other men in the area and had to be restrained by Officers." *Id.* at 4. In contrast, the amended complaint stated that Riocne "with intent to cause public inconvenience, annoyance or alarm, and recklessly creating a risk thereof, he [made] unreasonable noise or offensively coarse utterance, gesture or display, or address[ed] abusive language to any person present," in violation of 9 GCA § 61.15(a)(2) and (c)." RA, tab 49, ex. A at 2 (Am. Magistrate's Compl.).[5] The amended declaration omitted any reference to Riocne behaving aggressively by trying to fight with other men in the area and

[5] The People heightened their own burden when they initially charged the defendant with *recklessly* creating a risk of public inconvenience, annoyance or alarm, and subsequently amended the charge to allege *intent* to cause public inconvenience, annoyance or alarm, *and* recklessly creating a risk thereof. The defense raised this fact in closing arguments:

> But, they did add the element of intent to cause public inconvenience, annoyance, or alarm, and recklessly creating a risk thereof. The Court is aware that the statute is, or, recklessly creating a risk thereof. They chose to allege this conjunctively when they could have done it disjunctively, they didn't, and they haven't presented evidence sufficient to – to make their case as to that.

Tr. at 33 (Bench Trial).

instead added the fact that "Riocne continued shouting after being instructed multiple times to calm down and stop shouting." *See* RA, tab 49, ex. B at 1 (Am. Decl. Lisa Hack, May 13, 2011). This sentence merely clarifies the "tumultuous behavior" alleged in the original complaint.

**a. Allegation of New Facts**

**[10]** In *People v. Diaz*, we stated: "An amendment to an indictment which alleges no new facts and cites no new statutory citation has been held not to charge an additional or different offense." 2007 Guam 3 ¶ 16 (citing *United States v. Stone*, 954 F.2d 1187, 1191 (6th Cir. 1992)).[6] Riocne argues that the *Diaz* case stands for the proposition that an amendment that alleges new facts and a new statutory citation therefore charges an additional or different offense. *See* Appellant's Br. at 7-8. However, Riocne's interpretation of the *Diaz* holding is inaccurate. The *Stone* court, from which the *Diaz* holding was derived, stated: "We find it significant that the amended information alleged no new facts." *Stone*, 954 F.2d at 1191. Thus, the lack of new facts in an amended complaint is significant, rather than dispositive, and the allegation of new facts does not necessarily charge a new or different offense. *See id.* The amended complaint merely clarified "tumultuous behavior" by alleging that "Riocne continued shouting after being instructed multiple times to calm down and stop shouting," and new information on how the People were proceeding was given. *See* RA, tab 49, ex. B at 1 (Am. Decl.). Allegations of new facts in an amended complaint are analyzed to determine whether a defendant's substantial rights are prejudiced, discussed *infra* Part IV.A.2. *See Commonwealth v. Stanley*, 401 A.2d 1166, 1175 (Pa. Super. Ct. 1979) (analyzing whether allegations of new facts prejudice a defendant's

[6] Although the issue in *People v. Diaz* was the amendment of an indictment, the same rationale applies to the amendment of an information under 8 GCA § 55.20.

substantial rights). Thus, the question turns to whether the citation to a different subsection of a statute constitutes the charging of a different offense.

**b. Different Subsection Constituting a Different Offense**

**[11]** Title 9 GCA § 61.15(a), provides that "[a] person is guilty of disorderly conduct, if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof," he engages in certain types of behavior enumerated in the statute. 9 GCA § 61.15(a) (2005). We recognize that there are two views among courts as to whether different subsections within the same statute constitute separate offenses. *See Ex parte State*, 528 So. 2d 1159, 1162 (Ala. 1988) (view that subsections merely set out alternative ways of proving the same crime); *People v. Spotted Eagle*, 243 P.3d 402, 404 (Mont. 2010) (view that subsections constitute different offenses). We decline to formulate a blanket rule as to whether two subsections constitute a different offense because, under this particular amended complaint and statute, Riocne was charged with the same offense. Because the same state of mind requirement is attributed to the listed types of conduct, the statute merely set out alternative ways of proving the same crime of disorderly conduct. *See* 9 GCA § 61.15(a).

**[12]** In *People v. Salas*, we noted that 8 GCA § 55.20, Guam's statute permitting an accusatory pleading to be amended:

> [P]rovides the court with a flexible tool to allow parties to change easily small errors in their pleadings. . . . Unless a judge has been able to point to an added charge of which the defendant and his or her counsel had no knowledge or a substantial way in which a defendant has been prejudiced, judges have consistently allowed the prosecution to make this amendment.

2000 Guam 2 ¶ 13. Although the People amended the charge to allege disorderly conduct by way of an offensive gesture or display, Riocne had already been charged with disorderly conduct by way of violent and tumultuous behavior in the original complaint; it cannot be said that

Riocne had no knowledge of the incident giving rise to the charge of disorderly conduct. Riocne was on notice of the charge of disorderly conduct generally. Under these circumstances, he was not charged with an additional or different offense. Nevertheless, we still are required to determine whether the amendment and allegations of new facts somehow prejudiced Riocne in a substantial way. We find under the second prong of the conjunctive test that Riocne's rights were not substantially prejudiced.

**2. Prejudice to the Substantial Rights of the Defendant**

**[13]** In *Diaz*, we stated that analysis under the second prong of the test allowing for an amended indictment is "necessary even where an amendment does not charge an additional or new offense, as this type of amendment to an indictment may prejudice a defendant in 'a substantial way.'" *Diaz*, 2007 Guam 3 ¶ 17 (citing *Salas*, 2000 Guam 2 ¶ 13). We stated the standard for concluding if a defendant is prejudiced as follows:

> The test as to whether the defendant is prejudiced by an amendment to an indictment has been said to be whether a defense under an indictment as it originally stood would be equally available after the amendment is made, and whether any evidence the defendant might have would be equally applicable to the indictment in the one form as in the other.

*Id.* (quoting *United States v. Fawcett*, 115 F.2d 764, 767 (3d Cir. 1940)). Riocne fails to explain how his rights were prejudiced, and the record is devoid of any apparent prejudice caused by the amendment. Riocne's defense to the allegations of tumultuous behavior by way of shouting is that it was reasonable because he was hit in the head with a baseball bat and was talking to the police from the second deck of the apartment building. Tr. at 45 (Bench Trial). Riocne's defense to the amended charge of an offensively coarse utterance, offensive gesture or display by saying "fuck you" was that the statute being violated involves disorderly conduct, which does not encompass offensive speech. *See id.* Riocne continued to use his original defense to

tumultuous behavior and supplemented it with the second defense after the charge was amended. *See id.* Because the defense was just as available to Riocne after the amendment was made, he did not suffer any prejudice by the amendment.

**[14]** Allegations of new facts in an amended information or indictment can also cause prejudice to the substantial rights of the defendant. *See Stanley*, 401 A.2d at 1175. In determining whether a factual change produces a new offense, courts ask whether the crimes specified in the original charging pleading:

> [I]nvolve the same basic elements and evolved out of the same factual situation as the crimes specified in the amended indictment or information. If so, then the defendant is deemed to have been placed on notice regarding his alleged criminal conduct. If, however, the amended provision alleges a different set of events, or the elements or defenses to the amended crime are materially different from the elements or defenses to the crime originally charged, such that the defendant would be prejudiced by the change, then the amendment is not permitted.

*Id.* (footnotes omitted). The purpose of the test is to ensure that the defendant is apprised of the charges against him. *Id.* The subsections of Guam's disorderly conduct statute involve the same basic elements and only clarify the manner of conduct being alleged. The elements in the amended subsection are not materially different from the subsection originally charged, as the same state of mind is attributed to each manner of conduct enumerated in the statute. Again, Riocne was originally charged with violent or tumultuous behavior, which encompasses the behavior alleged in the amended subsection, i.e., making an offensive gesture or display. The charges also evolved out of the same factual situation. Although the People alleged the added fact that Riocne continued to shout after the police told him to stop, this event still occurred during the disturbance at the apartment complex. Because Riocne was apprised of the charges against him, the amendment did not produce a new offense so as to prejudice his substantial rights. Thus, the People's amendment of the complaint charging Riocne under a different

subsection of the disorderly conduct statute was allowable because the amendment did not charge him with a different offense or prejudice his rights in a substantial way.

**B. Failure to Arraign the Defendant on the Amended Charge**

**[15]** When the People moved to amend the charge, Riocne objected and stated that he would have to be arraigned on the new charge because it alleged a new statutory subsection. Tr. at 2 (Bench Trial). The trial court granted the motion over Riocne's objection on the basis that the People did not allege an additional or different offense. *Id.* Riocne argues that he was required to be arraigned on the amended charge and the resulting conviction is a nullity because he was not arraigned. Appellant's Br. at 8-9. The People concede that Riocne is correct in his assertion that he should have been arraigned on the new charge. Rule 13(i) Letter from Attorney General Re: People of Guam v. Nrinext Riocne, et al. (Oct. 26, 2011).

**[16]** Title 8 GCA § 60.10 reads:

> (a) The defendant shall be arraigned promptly after the indictment or information is filed or after the complaint is filed where prosecution by complaint is required by § 1.15.
>
> (b) Arraignment shall be conducted in open court and shall consist of reading the indictment, information or complaint to the defendant or stating to him the substance of the charge and calling on him to plead thereto. The defendant shall be given a copy of the indictment, information or complaint before he is called upon to plead.

8 GCA § 60.10 (2005).[7] Guam law does not indicate what arraignment procedure to follow in the case of an amended charge. Riocne argues that when a complaint is amended, "regular and orderly procedure requires the defendant be rearraigned and required to plead thereto before trial," unless the defendant waives objection to the amendment and lack of plea. Appellant's Br. at 9 (quoting *People v. Walker*, 338 P.2d 536, 539 (Dist. Ct. App. 1959). Riocne supports his

[7] Title 8 GCA § 60.10 is modeled after California Penal Code section 976. *See* 8 GCA § 60.10 (2005).

position by citing California case law interpreting section 1009 of the California Penal Code, which requires a plea to be made upon an amended information.[8] *See id.* at 9-10; *People v. Walker*, 338 P.2d 536 (Cal. Ct. App. 1959). However, this provision is not reflected in the Guam Code.[9] Moreover, the requirement that a defendant be arraigned on an amended information and submit a plea is not a strict one.

**[17]** Under Rule 10 of the Federal Rules of Criminal Procedure, arraignment is not necessary "when the defendant knows what he is accused of and is able to adequately defend himself." *United States v. Hart*, 457 F.2d 1087, 1089 (10th Cir. 1972) (citing *Garland v. Washington*, 232 U.S. 642 (1914)).[10] Recognizing this principle, the California Supreme Court held that failure to be rearraigned where a defendant should have been rearraigned is "at most, a mere irregularity." *In re Mitchell*, 56 Cal. 2d 667, 670 (1961). The *Mitchell* court explained:

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[8] Section 1009 of the California Penal Code states:

> An indictment, accusation or information may be amended by the district attorney, and an amended complaint may be filed by the prosecuting attorney, without leave of court at any time before the defendant pleads or a demurrer to the original pleading is sustained. . . . *The defendant shall be required to plead to such amendment or amended pleading forthwith, or, at the time fixed for pleading, if the defendant has not yet pleaded and the trial or other proceeding shall continue as if the pleading had been originally filed as amended, unless the substantial rights of the defendant would be prejudiced thereby, in which event a reasonable postponement, not longer than the ends of justice require, may be granted.* An indictment or accusation cannot be amended so as to change the offense charged, nor an information so as to charge an offense not shown by the evidence taken at the preliminary examination.

Cal. Penal Code § 1009 (West 2012) (emphasis added).

[9] It should be noted that section 1009 of the California Penal Code was enacted at the time that Guam adopted section 976 of the California Penal Code, reflecting a deliberate effort on the part of lawmakers to exclude the former. *See* Cal. Penal Code § 1009; 8 GCA § 60.10; Cal. Penal Code § 976 (West 2012) (repealed 2005).

[10] Title 8 GCA § 60.10 is similar to Federal Rule of Criminal Procedure 10:

> (a) In General. An arraignment must be conducted in open court and must consist of:
>
> (1) ensuring that the defendant has a copy of the indictment or information;
>
> (2) reading the indictment or information to the defendant or stating to the defendant the substance of the charge; and then
>
> (3) asking the defendant to plead to the indictment or information.

Fed. R. Crim. P. 10.

> The purpose of an arraignment or a rearraignment is to inform the accused of the charge against him and to give him fairly the opportunity to plead to it. If the defendant pleads to the basic charge, and a trial is had on it, the purpose of an arraignment has been served.

*Id.* "Where an information is amended, failure to rearraign and require a defendant to plea to the amended pleading is not prejudicial unless substantial rights of a defendant are prejudiced." *People v. Lomboy*, 116 Cal. App. 3d 67, 71 (Ct. App. 1981); *see also* 8 GCA § 55.20. Other jurisdictions that require rearraignment upon an amended information will waive the requirement if the amendment is merely one of form. *See, e.g.*, *State v. Sor-Lokken*, 805 P.2d 1367, 1371 (Mont. 1991); *State v. Hurd*, 105 P.2d 59 (Wash. 1940). The Washington Supreme Court stated:

> It is well settled that a substantial amendment of an information requires that the accused be arraigned on the amended information. . . .
>
> Where, however, the amendment is merely one of form, and not of substance, no rearraignment is necessary. . . .
>
> Whether or not appellant was entitled to rearraignment thus depends upon whether the amendment was one of form or one of substance.

*Hurd*, 105 P.2d at 61 (internal citations omitted). The Montana Supreme Court has explained that "an amendment is one of form and not substance when the same crimes are charged, the elements of the crimes remain the same, the required proof remains the same, and the defendant is informed of the charges against him." *Sor-Lokken*, 805 P.2d at 1371.

**[18]** Riocne was not rearraigned because the trial court found that he was not charged with an additional or different offense. Riocne should have been rearraigned, as required under 8 GCA § 60.10. However, under the *Mitchell* test, the trial court's failure to rearraign Riocne is "a mere irregularity" since Riocne had already been informed of the disorderly conduct charge against him and had already pled to the basic charge of disorderly conduct. *See In re Mitchell*, 56 Cal. 2d at 670. Thus, the purpose of arraignment was fulfilled because Riocne was previously informed of the charge and pled not guilty. Moreover, Riocne was able to adequately defend

himself against the amended charge at trial. Having established that Riocne's substantial rights were not prejudiced by the amendment, it follows that his rights were not prejudiced by the trial court's failure to rearraign him. Thus, the trial court's failure to rearraign the defendant was not reversible error.

## V. CONCLUSION

**[19]** There was no error in the trial court's granting of the motion to amend the complaint because no additional or separate offense was charged. Additionally, the trial court's approval of the amended complaint and its decision to not rearraign Riocne did not prejudice his substantial rights. Lastly, failure to rearraign Riocne was not reversible error because he was fully apprised of the charge of disorderly conduct at the time he was arraigned prior to commencement of trial and was able to adequately defend himself against the amended charge. Accordingly, we **AFFIRM** Riocne's conviction.

Original Signed By: Robert J. Torres
ROBERT J. TORRES
Associate Justice

Original Signed By: Katherine A. Maraman
KATHERINE A. MARAMAN
Associate Justice

Original Signed By: F. Philip Carbullido
F. PHILIP CARBULLIDO
Chief Justice